

1 federal respondents, in support of the Petitioners.

2 THEODORE B. OLSON, ESQ., Washington, D.C.; on behalf of

3 the Petitioners.

4 THOMAS S. WALDO, ESQ., Juneau, Alaska; on behalf of the

5 Respondents.

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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 07-984, Coeur Alaska v. The Southeast Alaska Conservation Council, and Case 07-990, Alaska v. The Southeast Alaska Conservation Council.

General Garre.

ORAL ARGUMENT OF GEN. GREGORY G. GARRE

ON BEHALF OF FEDERAL RESPONDENTS,

IN SUPPORT OF THE PETITIONERS

GENERAL GARRE: Thank you, Mr. Chief Justice, and may it please the Court:

The expert agencies charged by Congress with implementing the Clean Water Act have concluded that the discharge of fill material, like the mine tailings at issue in this case, should be permitted by the Army Corps of Engineers under section 404 of the Act, and are not -- are not subject to the effluent guidelines applicable to permits issued by the EPA under section 402 of the Act.

That interpretation is grounded on more than three decades of agency pronouncements and reflects the collective judgment and expertise of the Army Corps of Engineers and the EPA in administering the Act.

1 JUSTICE KENNEDY: If the discharge comes
2 from a single pipe, is it always one or the other, or
3 can it ever be both fill and --

4 GENERAL GARRE: Justice Kennedy, it's always
5 one or the other. The Clean Water Act establishes two
6 permitting regimes. And I think this is actually
7 something where the parties agree. Either it's going to
8 be permitted under section 402 of the Act, which covers
9 pollutants generally but not the discharge of dredged
10 material, or fill material, which is covered by section
11 404 of the Act.

12 CHIEF JUSTICE ROBERTS: That's a legal
13 answer to Justice Kennedy's question. What is the
14 physical answer? Can a pipe both emit sludge, fill, and
15 effluent?

16 GENERAL GARRE: As a practical matter, for
17 example, if you take the slurry in this case, which is
18 55 percent solid by volume, there is going to be liquid
19 coming out of that pipe with the slurry, but under the
20 definition that the agencies administer of fill
21 material, this is fill material under that definition.

22 JUSTICE SCALIA: Fill material trumps
23 effluent, in other words?

24 GENERAL GARRE: Fill material trumps
25 effluent. That's --

1 JUSTICE SOUTER: But it does -- here's the
2 problem that I am having and I think others may have.
3 We start, number one, with a definition, as I understand
4 it, of a pollutant that includes suspended solids.
5 Number two, there is an existing regulation to the
6 effect that wastewater from this particular method of
7 extracting gold shall simply not be released, shall not
8 be put into a water body. And then the two agencies
9 come along and in effect they say by regulation, if the
10 suspended solid in effect comes out of a mine, or if the
11 wastewater has got suspended solid in it, we are going
12 to call it "fill" and leave it entirely to the Army
13 Engineers under 404, subject to an EPA veto.

14 And on the face of it, it sounds as though
15 they are simply, number one, defining one -- one variant
16 of pollution out of the EPA's jurisdiction, and, number
17 two, with respect to the wastewater, in effect coming up
18 with a contradictory determination about what should be
19 done with it.

20 And it sounds as though, under the
21 Administrative Procedure Act, that with the statutory
22 and the regulatory regime on the one hand and this joint
23 regulation on the other, you've simply got a flat
24 contradiction, and query whether that can be anything
25 other than arbitrary and capricious under the APA. Will

1 you address that?

2 GENERAL GARRE: Sure, Justice Souter. First
3 of all, I those concerns really go to the definition of
4 "fill material," and I don't think that the Respondent
5 SEACC has squarely challenged that definition in this
6 case. And I would point you to two parts of the record.

7 JUSTICE SOUTER: Well, let's assume -- and I
8 don't mean to cut you off there, but before you're done
9 -- I am at least raising it because I find it very
10 difficult to get a handle on this case without dealing
11 with that problem. So you may say, well, they didn't
12 raise it well enough, but I still want you to deal with
13 it on the merits.

14 GENERAL GARRE: Sure. And let me just point
15 to the two parts of the record: The JA at 541 note 12,
16 where the Ninth Circuit acknowledged they didn't
17 challenge it; and also I would point you to the
18 complaint, where the complaint is directed to the
19 permits and does not seek a determination that the Fill
20 Rule definition is arbitrary and capricious.

21 We think that that definition reflects the
22 settled understanding and expertise of both agencies,
23 the Army Corps of Engineers --

24 JUSTICE GINSBURG: How could it be settled,
25 because isn't it a fact that before 2002 if the primary

1 purpose was disposing of waste that the 402 permit
2 applied?

3 GENERAL GARRE: That is correct,
4 Justice Ginsburg. By "settled," I mean it was settled
5 in 2002. They adopted this rule.

6 JUSTICE GINSBURG: So it's not in 30 years'
7 experience, and when it was disposing of waste, it was
8 under 402 until 2002.

9 GENERAL GARRE: I think the EPA has always
10 adopted and applied an effects test for determining
11 whether or not a discharge is fill material --

12 JUSTICE GINSBURG: But in fact, was there
13 ever a permit by the Corps of Engineers when the purpose
14 was disposal of waste? Was there ever a 404 permit,
15 rather than a 402, for disposal of what they call
16 "processed wastewater" or "wastewater"?

17 GENERAL GARRE: There was a period, of
18 course, Justice Ginsburg -- you are right -- where the
19 Army Corps of Engineers adopted a primary purpose test.
20 During that period -- you are right -- 404 permits were
21 not -- were not issued for the discharge of things where
22 the purpose was not to fill the lake; it was to dispose
23 of material.

24 Now, during that period, though, those
25 discharges were not regulated under section 402 of the

1 Act and under Section 306, the effluent guidelines, but
2 for a different reason. The reason why that they
3 weren't regulated under 402 during that period is
4 because of the agencies' wastewater treatment exception,
5 which is found at 40 C.F.R. 122.2, where the agencies
6 excepted from the definition of the "waters of the
7 United States" discharges into an impoundment area.

8 And what you have going on here is the
9 discharge of fill material into an impoundment area,
10 which is dammed off with a 50-foot dam. Those
11 discharges, in this case, are governed by section 404 of
12 the Act. But any discharges from that impoundment area
13 into downstream waters of the United States are subject
14 to section 402 of the Act -- there's a separate permit
15 in this case -- and are subject to the effluent
16 guidelines and the new source performance standards.

17 So you have those two. The agencies have
18 come together. They've reconciled the statutory
19 regimes, and they have the 404 permit of dredged
20 material, material that's going to fill the bottom of
21 the lake, raise it by 50 feet, governed by section 404
22 of the Act. That impoundment area then is sealed off,
23 and any discharged material out of that impoundment area
24 into waters of the United States is going to be governed
25 by 402 and the separate effluent guidelines there. That

1 --

2 JUSTICE SOUTER: That's pretty cold comfort
3 when you treat as an impoundment area a natural lake. I
4 suppose if the -- if it's proper to do what they're
5 doing here, then the lake in the middle of the
6 Everglades is an impoundment area, or a Great Salt Lake
7 is an impoundment area.

8 GENERAL GARRE: Well, any -- we're talking
9 about --

10 JUSTICE SOUTER: This is a long way from a
11 settling pond.

12 GENERAL GARRE: Well, let me address that in
13 two different ways: First of all, at the end of this
14 project, when the lake is going to be reclaimed, the
15 agencies determined that it's going to be
16 environmentally as sound, if not superior, for the
17 habitats in Alaska, fish and wildlife. So at the end of
18 the project, it is going to be --

19 JUSTICE SOUTER: Yes, but what's that --
20 what's that got to do with the definition of
21 "impoundment area"? My problem is that you are
22 treating -- the Corps is treating as an impoundment area
23 a whole natural lake as distinct from a settling basin.

24 GENERAL GARRE: The statute refers to
25 specified disposal sites and what you have here, you are

1 right, is a lake. But it's impounded by a 50-foot dam.
2 The other part I wanted to point to is the section 404
3 guidelines are rigorous environmental guidelines that
4 address a number of different concerns, including the
5 quality of the water, the fish and wildlife habitat, and
6 at the end of that process you have got the EPA, which
7 has the right to exercise a veto over --

8 JUSTICE SOUTER: You keep saying they are
9 rigorous. My understanding is -- and I didn't think it
10 was seriously disputed here -- is that during the period
11 in which the deposits are going to be made, the natural
12 life of this water body is going to be destroyed.

13 GENERAL GARRE: That's true.

14 JUSTICE SOUTER: And the Corps comes along
15 and says, oh, when it's all over, it will come back.
16 But when you're destroying the entire living sort of
17 corpus of this lake, it seems to me that it's getting
18 more lenient to say that there are rigorous
19 environmental standards.

20 GENERAL GARRE: That's true, Justice Souter,
21 but it's important to keep in mind that the reason why
22 the lake -- the fish in the lake are not going to
23 survive is because of the fill effect of the material,
24 not because of any toxics put into the water.

25 JUSTICE SOUTER: No, but as I understand it,

1 and you correct me if I am wrong here, I thought
2 "suspended solids," I guess is the buzz word for it, is
3 a form of pollution. So you're saying, well, we're
4 destroying the fish with one form of pollution rather
5 than another form of pollution. And I don't know that
6 that advances the ball for your side.

7 GENERAL GARRE: Any time you have fill
8 material going into the waters of the United States --
9 of course, section 404 doesn't apply until you've got
10 fill material going into the waters of the United
11 States.

12 JUSTICE SOUTER: Yes, but this comes back to
13 my initial question. You are simply, or the Corps is
14 simply, defining what would otherwise be a pollutant,
15 suspended solids discharged into the water, by calling
16 it fill material. And it -- in effect it's defining one
17 subject of -- of discharge regulation right out of the
18 law of the United States by redefining it and saying,
19 oh, it doesn't exist if it's coming out of a mine.

20 GENERAL GARRE: I think what the agencies
21 have done to reconcile their definitions is to apply
22 this effects test. Now, if Coeur Alaska sought to fill
23 the entire lake --

24 JUSTICE SOUTER: But to apply the effects
25 test, the legal effect, is it not, is to define one form

1 of pollution as no longer existent so long as that form
2 of pollution falls within the Corps of Engineers
3 definition of "fill."

4 GENERAL GARRE: I don't think that's
5 correct.

6 JUSTICE SOUTER: Is that correct?

7 GENERAL GARRE: The legal effect is to
8 regulate that pollution under section 404.

9 JUSTICE ALITO: General Garre, I don't want
10 to take up your rebuttal time, but what's the
11 environmental alternative to what was done here?

12 GENERAL GARRE: The primary environmental
13 alternative considered was a dry tailings alternative.
14 And that would be been problematic in two different
15 ways. One, it would have required the destruction of
16 some 100 acres of wetlands; and two, it would have
17 resulted in enormous stacks of tailings, 100 to 200
18 high, thousands of feet wide, that would actually dwarf
19 the Pentagon and be visible from nearby Berners Bay.

20 Now, the Army Corps of Engineers, the State
21 of Alaska, and the Forest Service determined that the
22 wet tailings option, putting the tailings into a lake,
23 and reclaiming that lake so that it would be
24 environmentally superior, was the preferable option.

25 I do want to emphasize that if this Court

1 has any doubt about the statutory text the regulatory
2 decisions here go back more than 30 years. In 1973 the
3 EPA adopted a rule that said that the discharge of fill
4 material is not regulated under the section 402
5 permitting system. In 2002, in the preamble to the fill
6 rule, the agency made clear again EPA has never
7 regulated the discharge of fill material under the
8 effluent guidelines.

9 JUSTICE GINSBURG: Weren't they then
10 thinking of fill material as material that was used
11 either to fill in, to reclaim land, or in a construction
12 project? I mean, to call filling a lake, to call that a
13 fill, when what it's doing is providing a disposal place
14 for a mining operation, it's not what one ordinarily
15 thinks of as a filling operation.

16 GENERAL GARRE: Not the Environmental
17 Protection Agency. The Environmental Protection Agency
18 since the passage of the Clean Water Act has taken the
19 position that discharge that has the effect of changing
20 the bottom elevation of a water is going to be fill.
21 And that makes sense as a practical matter. The
22 agencies with 30 years of experience determined that the
23 purpose definition that the Corps had adopted for a
24 period was unworkable, unpredictable and didn't make
25 sense. And I think that if there's any judgment that

1 the courts ought to defer to here, it's the judgment of
2 the agencies based on their collective experience as to
3 the proper definition of "fill material."

4 JUSTICE GINSBURG: There's one question that
5 Justice Souter raised and before you sit down I would
6 like to get your answer, and that is, can anything, any
7 water of the United States that the Corps of Engineers
8 decides is appropriate to be used as a disposal place,
9 can any waterway be a settling pond? That is, here we
10 have a lake. And is it just up to the Corps of
11 Engineers? They say this is a settling pond, it's a
12 settling pond?

13 GENERAL GARRE: I think as a practical
14 matter if you put discharge into a river and it may not
15 change the bottom elevation, that wouldn't be fill
16 material. But, Justice Ginsburg, there have been a
17 number of hypotheticals raised by Respondents here. Let
18 me address those. The section 404 process is a rigorous
19 environmental process, the EPA does have veto authority.
20 We haven't seen these problems at all in the six years
21 that the fill definition has been in place and I think
22 it's simply untenable to suggest that these standards,
23 which in section 4 require water quality determinations,
24 wildlife, aquatic determination, would result in the
25 sort of environmental harm that Respondents have

1 hypothesized, and the prospect of that harm is no basis
2 for this Court to override the statutory scheme that
3 Congress created with two distinct permitting regimes,
4 one for fill material, one for other pollutants, and to
5 override the agency's pronouncements, interpretations
6 for more than 30 years.

7 And the other agency document I wanted to
8 point to is very important. It's the 2004 mine tailings
9 memorandum, which is contained at JA-141 to 146. In
10 that memorandum, which is a 2004 memo by the heads of
11 the EPA water divisions, they explain the application of
12 the statutory and the regulatory scheme to these types
13 of discharges, discharges that fill material into the
14 impoundment is going to be subject to 404 and the
15 rigorous process there. Any discharges out of that
16 impoundment area is going to be subject to the rigorous
17 requirements of 402 and that agency interpretation is
18 entitled to deference.

19 CHIEF JUSTICE ROBERTS: Thank you, General.

20 GENERAL GARRE: Thank you, Your Honor.

21 CHIEF JUSTICE ROBERTS: Mr. Olson.

22 ORAL ARGUMENT OF THEODORE B. OLSON

23 ON BEHALF OF THE PETITIONERS

24 MR. OLSON: Mr. Chief Justice and may it
25 please the Court: Let me reemphasize one point. The

1 Clean Water Act itself, Congress created two distinct,
2 mutually exclusive but complementary permitting regimes.
3 One is fill material, which is governed by, administered
4 by the Corps of Engineers. The other is "other, except
5 as permitted under section 404," administered by the
6 EPA.

7 A discharge, in answer to your question,
8 Justice Kennedy, may be governed by one program or the
9 other, not both. Everybody admits that, including the
10 Respondents.

11 The fill rule --

12 JUSTICE STEVENS: But doesn't the EPA have a
13 veto power over the fill material permit?

14 MR. OLSON: Yes, it does, Justice Stevens.

15 JUSTICE STEVENS: So they're not totally
16 mutually exclusive.

17 MR. OLSON: It's mutually exclusive in terms
18 of the issuing agency, and I think that's a very
19 important point. We want to emphasize that, that the
20 rules pursuant to which the Corps of Engineers
21 administers the fill permit are the 404(b)(1) rules
22 which Congress specified to be enacted by the EPA. So
23 the rigorous rules governing the quality of the water
24 that's going to be affected by these fill permits are
25 established by the EPA.

1 Furthermore, the State is involved, the
2 fisheries departments are involved, the conservation
3 area of the State of Alaska. Many different agencies
4 are involved in this permitting process. The permits in
5 this case followed 900 studies, the expenditure of \$26
6 million, an evaluation by the EPA, the Corps of
7 Engineers, the department of conservation of Alaska,
8 and, Justice Stevens' point, finally before the permit
9 could be issued it had to go to the EPA and the EPA had
10 the power to veto the permit.

11 Now, Congress determined --

12 CHIEF JUSTICE ROBERTS: Could they veto it
13 due to its failure to comply with effluent limitations?

14 MR. OLSON: No, they could not do that,
15 Justice -- Chief Justice Roberts, because the --
16 Congress made a choice under sections 404 and 402.
17 Section 402, the EPA program, is governed by those
18 effluent limitations under 301 and 306 and standards of
19 performance.

20 Congress made a choice of applying section
21 307, which are toxic effluent limitations that apply to
22 the 404 permits. That 307 regime which Congress
23 selected, which is also endorsed by the EPA in the rules
24 that the -- that the Corps must follow in administering
25 the permit -- that 307 provision to which I just

1 referred to is in the 404(b)(1) regime rules. So all of
2 this, the permitting process, which Congress made the
3 decision to put into two baskets: Either it's fill
4 material or it's except permits under --

5 JUSTICE KENNEDY: What happens if the
6 agencies disagree as to whether it's fill? If 404 says
7 it's fill, EPA says it isn't, can the EPA then veto it
8 on that ground?

9 MR. OLSON: The -- the -- yes. I -- I think
10 the answer to that is yes. But the better answer to
11 that, Justice Kennedy, is for a while, as -- as General
12 Garre pointed out, the EPA had a different concept of
13 what was fill than the Corps of Engineers. The EPA
14 right from the beginning said it would be the effect on
15 the -- on the water.

16 The Corps for a while had that definition.
17 Then it used a purpose test. Both agencies, the EPA and
18 the Army Corps of Engineers, agreed in 2002 that that
19 "purpose" definition of the word "fill" was not
20 workable. It was too subjective.

21 JUSTICE KENNEDY: But there are still going
22 to be cases, I would assume very close cases, even under
23 the present standard, where there could be disagreement.

24 MR. OLSON: Well, there could be
25 disagreement, but I was just about to say that this rule

1 was jointly adopted by the Corps of Engineers and the
2 EPA in 2002. To the extent there is any ambiguity as to
3 what fill material is, both the Army Corps of Engineers
4 and the EPA agree that it includes slurry from mines.
5 So that --

6 JUSTICE GINSBURG: The definition that was
7 adopted, if I have it right, was the EPA definition.
8 That was the effect. And it was the Corps that had the
9 purpose test. And yet, until 2002, if I understand
10 correctly, if the only reason of raising the elevation
11 of the lake was to dispose of waste, you didn't get a
12 404 permit. That was not a 404 situation until 2002.

13 MR. OLSON: That's -- that's -- except in
14 the early stage, as I understand it, the Corps and --
15 the Corps also used the "effects" test. Then there was
16 a period of time when it used a "purpose" test. The EPA
17 consistently used the -- the "effects" test. In --

18 JUSTICE GINSBURG: But in an application
19 that never included filling a lake, raising the
20 elevation of a lake simply for the purpose of disposing
21 of waste.

22 MR. OLSON: That's -- that's -- until that
23 point, that's correct, Justice Ginsburg. But the two
24 agencies that were involved in this process determined
25 that that was not a workable test. It didn't function

1 well. It allowed too much evasion and -- and
2 manipulation, and they both came together after long
3 studies and decided a reasonable interpretation that was
4 effective, consistent, and workable.

5 Under the Clean Water Act, both agencies
6 came together and decided that the definition included
7 the placement of overburden, slurry, tailings, or
8 similar mining-related materials.

9 Now, to the extent there is any ambiguity in
10 the statute, this is the reasoned judgment, notice-and-
11 comment rulemaking by the two agencies given
12 responsibility.

13 JUSTICE BREYER: I -- I perhaps am missing
14 this. I -- this is in general what I don't understand,
15 how this works. My understanding is that under 404
16 something is "fill" -- they have a definition. And it's
17 "fill," among other things, if it changes the bottom
18 level of any portion of water in the United States. Is
19 that right?

20 MR. OLSON: That's correct.

21 JUSTICE BREYER: And somewhere I have the
22 idea -- but I can't find it in the briefs now -- that it
23 has to raise the bottom level by 55 feet.

24 MR. OLSON: No, I don't -- that does not --

25 JUSTICE BREYER: There is some number of

1 feet.

2 MR. OLSON: I don't know where you got that.
3 That is the result in this case.

4 JUSTICE BREYER: That's the result of this
5 case. But, anyway, it raises the level. I guess it has
6 to raise it some significant amount. All right. So
7 what happens in this situation?

8 Let us think of the worst pollutant you can
9 think of. Think of that. I don't know what it is.
10 Maybe it's saturated fat in potato chips, something
11 absolutely terrible.

12 MR. OLSON: Cholesterol.

13 JUSTICE BREYER: All right. We are going to
14 think of that pollutant. And now let's suppose that
15 with the agreement of the Army Corps of Engineers a
16 company takes this pollutant, which is the worst one you
17 could think of, that the EPA would never let you go
18 within 50 feet of it, and they take it, and they fill a
19 lake with it up to the level of 55 feet, or 20 feet, or
20 whatever number of feet.

21 I mean, it just can't be that simply because
22 they poured a lot of it in and it fills up the bottom of
23 the lake that suddenly the EPA can't regulate it any
24 more. Now, that -- that -- since that's so
25 counterintuitive, that all you have to do is take a

1 terrible pollutant and fill the bottom of the lake with
2 it and now it's up to the Army Corps of Engineers and
3 not up to the EPA -- that's so counterintuitive that I
4 assume I don't understand the statute, and you will
5 explain it to me.

6 MR. OLSON: Yes, I will, Justice Breyer. If
7 it's fill, the administrating, permitting agency is the
8 Army Corps of Engineers.

9 JUSTICE BREYER: Uh-huh.

10 MR. OLSON: But in granting that permit, in
11 evaluating that permit, they must follow the 404(b)(1)
12 guidelines that were drafted and written by the EPA. So
13 that -- and EPA has all sorts of provisions. It can't
14 have an adverse effect on the water. There cannot be a
15 preferable environmental alternative. It must go
16 through the Marine Fisheries. It cannot contain that
17 toxic material that you are talking about, that worst
18 material in the world.

19 JUSTICE SCALIA: But it can contain it so
20 long as it is -- as it -- as it is not transitory.

21 MR. OLSON: No --

22 JUSTICE SCALIA: I mean, isn't it arguable
23 that the best place for -- for really toxic stuff is at
24 the bottom of a lake so long as it stays there and is
25 not carried --

1 MR. OLSON: That -- that may be, but the
2 Rule 404(b)(1) guidelines address both that point, and I
3 understand your point, too. But in -- on 11(a) of the
4 Government's brief the -- the 404(b)(1) guidelines are
5 set forth, and it includes a provision, number 2 on that
6 page, "violates any applicable toxic effluent standard
7 or prohibition under section 307 of the Act." So the
8 water quality is going to be regulated according to EPA
9 standards.

10 JUSTICE BREYER: It is identical. So it
11 doesn't make any difference.

12 MR. OLSON: Pardon me?

13 JUSTICE BREYER: I -- I heard you say before
14 that it was not identical. That -- I mean if, of
15 course, EPA takes all its regs and applies those regs
16 when the Army Corps of Engineers considers a permit
17 under 404 so that you couldn't get an Army Corps of
18 Engineers permit unless you complied with the 402
19 etcetera regs, then this all could come to nothing.

20 MR. OLSON: Every -- every --

21 JUSTICE BREYER: So there must be something
22 missing in that.

23 MR. OLSON: Yes, there is.

24 JUSTICE BREYER: What?

25 MR. OLSON: The difference that a regulation

1 --

2 JUSTICE BREYER: What is the most important
3 thing that is missing?

4 MR. OLSON: The -- there is not -- it's --
5 it's -- the most important thing that is present is that
6 Congress decided that these regulations that the --
7 "fill" is different stuff. It was for a different -- it
8 had different consequences and should be regulated in a
9 different way. The definition --

10 JUSTICE BREYER: I think what might be
11 missing --

12 JUSTICE SCALIA: Is nontoxic covered by 402?

13 MR. OLSON: Pardon me?

14 JUSTICE SCALIA: Nontoxic is covered by 402.
15 You -- you can violate the effluent guidelines by -- by
16 pouring into the waters of the United States even
17 nontoxic materials, isn't that right?

18 MR. OLSON: Yes, yes.

19 JUSTICE SCALIA: And under 404 it'S only
20 toxic.

21 MR. OLSON: That's correct.

22 JUSTICE SCALIA: And that's the big
23 difference.

24 MR. OLSON: And -- and -- and I'm going to
25 reserve the balance, if I might, for rebuttal. But let

1 me just say "pollutant" includes sand and rock. And
2 what's being put in this settling area, this lake, is
3 the sand, which is the same consistency of the bottom of
4 the lake. It's inert material. It does not changing
5 the chemical composition. It is not hurting the water
6 quality of the lake.

7 JUSTICE SOUTER: But it's going to kill
8 every living creature in the lake, right?

9 MR. OLSON: Putting sand or rocks --

10 JUSTICE SOUTER: Wait a minute. It is going
11 to kill everything in the lake.

12 MR. OLSON: Yes, it is, Justice Souter.
13 Putting sand in the bottom of the lake is going to do
14 that. They are going to reintroduce the fish. It will
15 be a bigger lake with a better aquatic system when it's
16 finished. But, yes, you are correct, in the interim the
17 sand at the bottom of the lake will kill those fish.

18 JUSTICE GINSBURG: And how do we know that
19 life will ever be restored? I mean, that's a guess.
20 Nobody knows.

21 MR. OLSON: It's a -- it's a condition for
22 the permit, and every agency which examined this,
23 including the Fisheries Department, the -- the
24 conservation agencies of the State of Alaska -- and
25 specifically said in the administrative record that

1 under the worst-case scenario they believe that all of
2 that is going to take place, and there will be more fish
3 in a bigger lake and more livable living conditions for
4 the fish and aquatic life after this process is
5 finished.

6 CHIEF JUSTICE ROBERTS: Thank you, Mr.
7 Olson.

8 Mr. Waldo.

9 ORAL ARGUMENT OF THOMAS S. WALDO

10 ON BEHALF OF THE RESPONDENTS

11 MR. WALDO: Mr. Chief Justice, and may it
12 please the Court:

13 In section 306(e), Congress enacted an
14 unqualified prohibition against operating any new source
15 in violation of any standard of performance applicable
16 to the source. The standard of performance at issue in
17 this case is applicable on its face to the formula at
18 the Kensington mine. It says there shall be no
19 discharge of processed wastewater into navigable waters
20 from mills that use the froth-flotation process.

21 CHIEF JUSTICE ROBERTS: Of course, the
22 provision that authorizes permits begins by saying
23 "Except as provided in sections 1328 and 1344," and 1344
24 is 404. So why doesn't that just take the 404 regime
25 completely out of what you were just talking about?

1 MR. WALDO: Because that's only a statement
2 about whether section 402 applies. It means that if you
3 have a section 404 permit, you don't also need a section
4 402 permit. It doesn't say anything about whether a 404
5 permit is appropriate under any particular
6 circumstances, and it doesn't say anything about whether
7 section 306 is applicable. In fact --

8 JUSTICE ALITO: The standard has to be --
9 the standard has to be applicable and this is an EPA
10 regulation, isn't it?

11 MR. WALDO: Yes.

12 JUSTICE ALITO: And the EPA has said this
13 isn't applicable to this situation.

14 MR. WALDO: But that determination was based
15 on a misinterpretation of the Clean Water Act. That
16 prefatory clause that the Chief Justice was asking about
17 doesn't say anything about whether section 306 applies.
18 306 does not have a prefatory clause like that, which
19 strongly suggests that it's not intended to apply there.
20 In other --

21 JUSTICE ALITO: So your position requires us
22 to determine that EPA's interpretation of those, the
23 statutory regime that you are talking about, 306 and
24 402, is contrary to the statute?

25 MR. WALDO: That the interpretation as it's

1 presented in this case is contrary to the statute.

2 JUSTICE SCALIA: If EPA were to amend the
3 performance standard to say that it doesn't apply in the
4 situation in which the fill rule applies, would that be
5 a valid regulation?

6 MR. WALDO: Well, I doubt that EPA could --
7 could lawfully under the Clean Water Act enact such a
8 thing, because the Clean Water Act requires EPA to
9 regulate suspended solids and EPA has always regulated
10 suspended solids through effluent limitations.

11 JUSTICE SCALIA: Could the -- could the EPA
12 allow a point source to discharge sand slurry -- there's
13 nothing in it but sand -- into a river? Wouldn't you
14 have to -- wouldn't you need some permission from the
15 EPA to do that? Wouldn't that violate the Act?

16 MR. WALDO: If it -- I'm sorry, so it --

17 JUSTICE SCALIA: I want to discharge. I
18 have a pipe and there is sand on my land which is being
19 washed away. I'm discharging all that sand into a
20 river.

21 MR. WALDO: Yes --

22 JUSTICE SCALIA: Would that violate --

23 MR. WALDO: That's a discharge of a
24 pollutant, that's correct.

25 JUSTICE SCALIA: Discharge of a pollutant.

1 MR. WALDO: Yes. And so --

2 JUSTICE SCALIA: Now, if I do the same thing
3 in a lake, because I want to fill the lake, of what
4 possible application is the fill standard unless it
5 permits what would otherwise be prohibited under --
6 under the earlier sections?

7 MR. WALDO: Well, the Corps of Engineers has
8 the authority under section 404 to grant fill material
9 permits --

10 JUSTICE SCALIA: Even though it violates
11 effluent standards.

12 MR. WALDO: No, not when it violates
13 effluent standards.

14 JUSTICE SCALIA: But you say -- you say that
15 if you discharge sand into -- into a river it violates
16 effluent standards.

17 MR. WALDO: Oh, that doesn't -- oh, I'm
18 sorry. I didn't understand that part of your question.
19 Yes, if -- if there is an effluent limitation for a
20 particular source -- remember, effluent limitations are
21 adopted for industrial sources, so you would have to
22 look at what the source of that discharge was.

23 And if EPA had identified that source, a
24 particular kind of factory of some kind, a mill, you
25 know, a leather tanning facility or something like that,

1 if EPA had adopted effluent limitations that were
2 applicable to that source, then discharges have to
3 comply with those effluent limitations.

4 It's important to realize here that the
5 Clean Water Act, contrary to the way the Petitioners try
6 to present it, is not just one big permitting statute.
7 It's not simply 402 and 404 and that determines
8 everything. The effluent limitations under sections 301
9 and 306 have independent applicability directly to
10 discharges. They are separately enforceable by EPA and
11 through citizens.

12 CHIEF JUSTICE ROBERTS: The discharges we
13 are talking about have to be discharges of effluent,
14 right?

15 MR. WALDO: Something that is governed by an
16 effluent limitation, yes.

17 CHIEF JUSTICE ROBERTS: My question is, does
18 it apply to solids?

19 MR. WALDO: Absolutely. EPA is required in
20 the Clean Water Act to regulate suspended solids through
21 effluent limitations.

22 CHIEF JUSTICE ROBERTS: Well, I guess, I
23 mean, does suspended solids mean there is some liquid
24 involved?

25 MR. WALDO: That implies some liquid, right;

1 that -- that the solids are present in the liquid, like
2 the discharge here.

3 CHIEF JUSTICE ROBERTS: Like the discharge
4 here. Now, I think Mr. Olson said these are 55 percent
5 solid by volume.

6 MR. WALDO: By weight. By volume it is 30
7 percent solids.

8 CHIEF JUSTICE ROBERTS: Is there a point at
9 which it's proper to speak of it as a solid rather than
10 a suspended solid? I mean, 90 percent by weight or by
11 volume, whichever it is, solid?

12 MR. WALDO: Well, the standard in this case
13 prohibits a discharge of processed wastewater.

14 CHIEF JUSTICE ROBERTS: Right.

15 MR. WALDO: And so, it --

16 CHIEF JUSTICE ROBERTS: You wouldn't think
17 something that's 90 percent solid is wastewater?

18 MR. WALDO: There might be some point at
19 which the liquid content of a solid waste is so small
20 that EPA wouldn't regard it as processed wastewater
21 anymore. But that's not the case here. In this case,
22 there is no dispute that the discharge is processed
23 wastewater. The government has conceded that point.

24 And -- and it's extremely important, because
25 EPA is required to, as I said, regulate suspended solids

1 through effluent limitations and to adopt a zero --

2 CHIEF JUSTICE ROBERTS: So if they were just
3 putting whatever it is that doesn't have any water,
4 concrete, into this lake, then you agree that it would
5 be just the Corps of Engineers through the fill -- fill
6 provisions that would govern that?

7 MR. WALDO: As long as there is no effluent
8 limitation governing it, yes.

9 CHIEF JUSTICE ROBERTS: And so, if they chop
10 up the concrete and put a little water in so that it's
11 easier to move, then all of a sudden it comes under 402
12 and the EPA's jurisdiction?

13 MR. WALDO: It depends on if EPA has adopted
14 an effluent limitation for it. So if that waste stream
15 that you are describing comes from some kind of factory,
16 concrete -- for example, cement manufacturing is a
17 source category that EPA --

18 CHIEF JUSTICE ROBERTS: I guess I'm just
19 curious how that makes any sense, since we are talking
20 about putting something into water. I mean, does it
21 really matter whether you add the water before it goes
22 into the lake or just the lake adds the water when you
23 put in the solid?

24 MR. WALDO: EPA --

25 CHIEF JUSTICE ROBERT: Either way, I guess

1 your friends on the other side would argue, I assume,
2 that it's properly regarded as fill material, because
3 that is the effect of it, rather than as effluent
4 subject to 402.

5 MR. WALDO: EPA has always regulated
6 industrial sources that -- whose raw processed
7 wastewater contains high levels of suspended solids,
8 high enough that it would have the effect of fill
9 material and can be considered fill. In fact -- and, in
10 fact, EPA has always had a definition of fill material
11 that was based on the effects.

12 So for more than 30 years, EPA has been
13 regulating sources like ore processing mills, cement
14 manufacturing plants, aluminum smelters, coal-fired
15 power plants, all of which and many more require the use
16 of settling ponds to remove the solids.

17 JUSTICE KENNEDY: So do we decide -- we
18 decide this case on the assumption that this is fill?
19 Do you agree that this is fill?

20 MR. WALDO: It's both. It's fill material
21 and it's processed wastewater that is subject to an
22 effluent limitation.

23 JUSTICE KENNEDY: Well, then the question
24 that we've put earlier is whether or not a single pipe
25 contained both, and you say that it can contain both.

1 MR. WALDO: Well, it's -- it's one slurry.
2 It meets both definitions. The solids are part of the
3 processed wastewater.

4 JUSTICE KENNEDY: It's one -- visibly, it's
5 one stream, but you say it consists of two things.

6 MR. WALDO: Well, it is -- it is a slurry
7 that contains water, chemicals --

8 JUSTICE KENNEDY: Is it both slurry -- is it
9 both fill and non-fill?

10 MR. WALDO: It's -- it's fill and it's
11 processed wastewater.

12 JUSTICE ALITO: Well, if it's both -- do you
13 agree that there can be only one permit; there can't be
14 a 402 and a 404 permit?

15 MR. WALDO: No. In this case there can't be
16 any permit because there is a new source performance
17 standard that prohibits --

18 JUSTICE ALITO: All right. So, let's change
19 that. What if the -- what if the new source performance
20 standard was not a total prohibition? What if there was
21 an effluent limitation in there, so that a permit could
22 be issued, provided that there was compliance with the
23 effluent limitation? Now, who issues the permit? And I
24 repeat, I understand it's your position that there can't
25 be both a 402 and a 404 permit.

1 MR. WALDO: If there is an effluent
2 limitation applicable, it will end up having to be EPA
3 that issues the permit, and that's -- that's simply
4 because the Corps of Engineers just doesn't have the
5 tools available to apply effluent limitations in its 404
6 permits, except for toxic substances.

7 JUSTICE ALITO: Where do you find that in
8 the statute?

9 MR. WALDO: Well --

10 JUSTICE ALITO: Where there's a situation
11 where possibly there could be a 402 and a 404 permit,
12 the 402 permit trumps the 404 permit?

13 MR. WALDO: Well, it's just that -- where we
14 find that is in section 306(e), which says -- which is a
15 prohibition against offering -- operating sources in
16 violation of performance standards. And here --

17 JUSTICE ALITO: This wouldn't be an
18 operation in violation of a performance standard. There
19 would be a performance standard.

20 MR. WALDO: The performance standard that
21 says --

22 JUSTICE ALITO: That can be put into a 402
23 permit.

24 MR. WALDO: Oh, I see what you are saying.
25 Yeah. Well, even -- the -- what the problem is is that

1 section 404 doesn't make any provision for application
2 of effluent limitations and performance standards under
3 sections 301 and 306.

4 JUSTICE ALITO: And 402 doesn't make any
5 application for -- for the 404 regulations.

6 MR. WALDO: Yeah, that's correct. But it
7 does provide the tool for EPA to apply those effluent
8 limitations that you were asking about. The effluent
9 limitations have to be complied with, and EPA is the
10 agency under section --

11 JUSTICE ALITO: Where does it make the --
12 where does it make provision for application of the
13 standards that should apply to fill under 404?

14 MR. WALDO: Well, those standards apply if
15 you have fill material that is not subject to some
16 effluent limitation. Effluent limitations are only
17 adopted for industrial sources --

18 JUSTICE ALITO: Where does the statute say
19 that?

20 MR. WALDO: Where does it say -- I'm sorry.
21 Could you clarify the question?

22 JUSTICE ALITO: Where does it say that? You
23 say that there can't be two permits and you say 402
24 trumps 404. And I'm asking where in the statute does it
25 say that?

1 MR. WALDO: It is an absence of a provision
2 in 404, but -- but the thing is, even if 404 has -- even
3 if the Corps of Engineers -- and I should say, we agree
4 with the Government and with the agencies about this.
5 The agencies have never interpreted section 404 to
6 provide for the application of effluent limitations in
7 404 permits. The 404(b) guidelines don't provide for
8 it; it's not provided in the statute. And so, they just
9 don't have the ability to do it.

10 The problem is, they try to carry that a
11 step farther and take that absence of provision to say
12 that it's an exception from effluent limitations, to say
13 that they don't have to comply with section 301 and 306,
14 but it doesn't say that; and that's an implied
15 exception, and the Court should only find an implied
16 exception if it's necessary to avoid absurd results.

17 JUSTICE BREYER: Could you go --

18 MR. WALDO: No one --

19 JUSTICE BREYER: Excuse me. Could you go
20 back for a second to my discussion with Mr. Olson? I'm
21 thinking of it in very simplified terms. The simplified
22 terms is, I think of a pipe and I think of a
23 circumstance where some terrible pollutant comes out of
24 the pipe that would be subject to 306; and if the pipe
25 goes up in a river or a lake, a regular lake, it could

1 fill up the bottom. Seems possible.

2 MR. WALDO: Yes.

3 JUSTICE BREYER: All right. So if it fills
4 up the bottom, it's called fill and comes under 404.

5 MR. WALDO: It doesn't even have to fill it
6 up very much --

7 JUSTICE BREYER: Yes, I know, I know that.
8 I see the point. But I mean, it seems to me if it fills
9 up to the bottom to whatever point, it's fill, and now
10 it's the Army Corps of Engineers. If it has effluent in
11 it, it's effluent and so now it's under EPA. In other
12 words, you have both.

13 MR. WALDO: That's the situation.

14 JUSTICE BREYER: It's only been going on for
15 40 years. I'm sure this isn't the first time they've
16 had both.

17 MR. WALDO: That's exactly right.

18 JUSTICE BREYER: And -- and so I don't
19 understand. What I would think of is if you have two
20 sets of standards and it's both, they should satisfy
21 both. I'm not writing these statutes.

22 MR. WALDO: Well, let me -- I think --

23 JUSTICE BREYER: Now, I heard from -- and I
24 might interpret Mr. Olson -- he may not have really said
25 this, but the way I heard it was: Well, don't worry,

1 because if it's fill and you get it over to the Corps of
2 Engineers, they are going to apply the effluent standard
3 anyway. And now you are sort of saying: Well, or they
4 are going to apply some standard. And then there was a
5 question of well, what standard, and we got a little
6 vague there.

7 Now, what happens if it goes to the EPA as
8 effluent? Justice Alito's question is, well, do they
9 apply the fill standard? And between my response to
10 these two answers, I still don't understand how it
11 works. It's -- help me.

12 MR. WALDO: The Corps of Engineers only
13 applies toxic effluent limitations. There are other
14 pollutants that are nontoxic --

15 JUSTICE BREYER: Okay. So now, if you lose
16 this case, what we are going to have is all the fish are
17 going to be killed by some horrible pollutant, and the
18 -- the Army Corps of Engineers can't do anything about
19 it, and the only reason is we put enough of the
20 pollutant in there to fill it up to ten feet from the
21 bottom. And then if you did it the other way, if the
22 EPA regulated it, it might do something terrible under
23 404, and they couldn't do anything about it.

24 Now it's very hard for me to believe that
25 that's really how these agencies have been operating for

1 40 years.

2 MR. WALDO: Well, that's not; and let me
3 explain how they have been operating, because I think
4 that will help clarify it. For 40 years EPA has
5 regulated sources like ore processing mills, aluminum
6 smelters, others that I have named, others that are
7 listed in our brief, and has applied effluent
8 limitations to those discharges. Now, you hear --

9 CHIEF JUSTICE ROBERTS: Even when they --
10 even fill -- even when they fill a lake?

11 MR. WALDO: Yes, absolutely -- and let me
12 explain that, because you hear this statement a lot:
13 "EPA never regulates fill material." Well, that's
14 because when you apply the effluent limitations, it's
15 not fill material anymore.

16 The effluent limitations require the use of
17 settling ponds that are not in navigable waters. The
18 settling ponds or other technologies remove almost all
19 of the solids so that the discharge that is permitted by
20 EPA in the section 402 permit might have a limitation of
21 20 or 30 milligrams per liter, something that wouldn't
22 have a measurable filling effect on the receiving water
23 body.

24 CHIEF JUSTICE ROBERTS: So when EPA
25 regulates has regulated these for 40 years, which I

1 assume is up until 2002, then it's -- it's because they
2 don't go into lakes; it's because they go into settling
3 ponds?

4 MR. WALDO: Settling ponds.

5 CHIEF JUSTICE ROBERTS: Which are not
6 navigable waters of the United States.

7 MR. WALDO: Exactly.

8 CHIEF JUSTICE ROBERTS: So the new
9 regulation says the EPA does not regulate it when it
10 goes into -- I can understand why the Army Corps of
11 Engineers doesn't care if it's an impoundment pond or a
12 settling pond, but they do care when it's a lake.

13 MR. WALDO: When they adopted the new
14 regulation, they were very clear that they intended to
15 continue their past practice. The agencies never stated
16 an intent to repeal or modify or change the
17 applicability of any effluent limitations, and in fact
18 this question came up repeatedly: What happens if it's
19 fill material but it's subject to an effluent
20 limitation; and every time they addressed it, they said
21 the same thing. Effluent limitations will continue to
22 apply and will be applied through section 402 permits.

23 CHIEF JUSTICE ROBERTS: To fill material as
24 defined in the 2002 regulation?

25 MR. WALDO: That's what it's all about, yes.

1 That's what they were talking about. That was addressed
2 over and over again in the -- in the Fill Rule, and they
3 never --

4 CHIEF JUSTICE ROBERTS: Which, which, which
5 -- I'm sorry, which Fill Rule?

6 MR. WALDO: The -- I'm talking about the
7 Federal Register preamble and the --

8 CHIEF JUSTICE ROBERTS: Yes. You are
9 talking about the preamble. I'm looking at the
10 definition of fill material in -- whatever -- it's
11 reproduced at page 7a and 8a of the government's brief.

12 MR. WALDO: Right.

13 CHIEF JUSTICE ROBERTS: The -- definition --

14 MR. WALDO: The definition of fill material
15 is simply a definition. By itself it doesn't have any
16 operative effect. It doesn't -- it doesn't authorize
17 any particular kinds of discharges.

18 JUSTICE SCALIA: Yes, but -- but do you have
19 a -- a case over these 40 years where a company was
20 trying to use the emission from the mine as a fill
21 material in a lake rather than in a settling pond, and
22 where the EPA, despite the fact that it was using it to
23 fill a lake, applied its effluent standards?

24 MR. WALDO: No, it's been permitted --
25 prohibited.

1 JUSTICE SCALIA: Well, then --

2 MR. WALDO: It's been prohibited. It's
3 illegal for EPA to permit the discharge of the processed
4 wastewater --

5 JUSTICE SCALIA: Evidently not. I mean, the
6 EPA says not. Do you have a -- an instance where it was
7 prohibited where a company wanted to -- to emit fill
8 material into a lake and the EPA said no, you can't do
9 it, because of the effluent limitations?

10 MR. WALDO: Well, if any -- I don't know if
11 anyone ever asked to do that, but if they did the answer
12 would have been no. I can't come up with an answer
13 because that's what the effluent limitations require.

14 JUSTICE SCALIA: But your -- your 40 years
15 of experience then really don't -- don't cover this
16 case. People have been putting it into settling ponds.

17 Let me ask you another question. The other
18 side says that the alternative to this would be even
19 worse, or it sounds worse to me, anyway. What -- what
20 is your solution, closing down the mine? Is there --

21 MR. WALDO: No, no, no. We -- we agree with
22 EPA on this point. There is a different of opinion
23 between EPA and Corps of Engineers as to which was the
24 preferred site. EPA preferred the dry land disposal
25 site, and -- and we agree that has much less adverse

1 affect on the ecosystem.

2 JUSTICE GINSBURG: -- your description of
3 that effect? The other solution we were told would
4 involve filling in a vast expanse of wetlands and then
5 having these huge piles that could be seen by all the
6 tourist boats.

7 MR. WALDO: Yes, it has -- it does have
8 adverse impacts, that is, some; but in EPA's view and in
9 our view is not as bad as filling up a lake and killing
10 all the fish and aquatic life in the lake.

11 CHIEF JUSTICE ROBERTS: All the fish, there
12 are a thousand fish in this lake, right?

13 MR. WALDO: Yes. Right.

14 CHIEF JUSTICE ROBERTS: And those aren't
15 endangered fish; there are millions of them somewhere
16 else, right?

17 MR. WALDO: That's right. But it's -- it's
18 also an important point for us here that this is a
19 national rule, and EPA considered these kind of
20 alternative land use requirements as an effect of its
21 no-discharge rule. When the -- EPA specifically
22 addressed the fact that if you prohibit discharges of
23 processed wastewater into navigable waters, it's going
24 to require using more land to dispose of all that solid
25 waste somewhere, and they determined that the benefits

1 of keeping processed wastewater out of the navigable
2 waters was worth it. And so it's both site-specifically
3 preferable, and it's a determination that was based
4 on --

5 JUSTICE ALITO: Wasn't there a decision in
6 the lower courts that the alternative was unacceptable
7 as well? And would you represent that if the case were
8 remanded, that would not be your position on remand?

9 MR. WALDO: Oh, we've already taken that
10 position, yes. We've been working -- we -- we were
11 working with the mining company after the Ninth Circuit
12 decision to identify --

13 JUSTICE ALITO: It was never your position
14 that that was unacceptable?

15 MR. WALDO: I'm sorry?

16 JUSTICE ALITO: It was never your client's
17 position that creating these permanently destroyed
18 wetlands and creating a mound that was bigger than the
19 Pentagon was an unacceptable solution to the --

20 MR. WALDO: I don't want to make any
21 representations about what a client may have said over
22 the last 20 years of this mine, but I can tell you that
23 we were working with the agencies and with Coeur to
24 identify an alternative site they -- or the Coeur
25 applied for the permits to do that, and pursuant to this

1 mediation we were having and then abruptly pulled out a
2 few weeks ago.

3 JUSTICE SCALIA: Why do you said the EPA
4 preferred the -- the solution of filling in the wetlands
5 and creating an ash Pentagon?

6 MR. WALDO: When -- when the Corps of
7 Engineers proposed the draft 404 permit, EPA commented
8 on it and said, we disagree with your conclusion that
9 filling up the lake is the least environmentally
10 dangerous.

11 JUSTICE SCALIA: Well, if it really felt
12 that way, couldn't it simply have vetoed the permit?

13 MR. WALDO: Yes, EPA can veto --

14 JUSTICE SCALIA: So it couldn't have felt
15 very strongly about it.

16 MR. WALDO: Well, EPA -- the veto authority
17 is a discretionary authority.

18 JUSTICE SCALIA: Right.

19 MR. WALDO: It's for unacceptable adverse
20 consequences. And for understandable reasons, EPA very
21 rarely exercises that authority. But EPA never changed
22 its position about whether the -- about which was the
23 preferred alternative. The EPA --

24 JUSTICE SCALIA: It couldn't have preferred
25 it very much, or it would have vetoed this one.

1 MR. WALDO: It -- apparently not enough to
2 come to the conclusion that it was one of those
3 situations where they wanted to veto based on
4 unacceptable adverse consequences.

5 CHIEF JUSTICE ROBERTS: Is there any aquatic
6 life in this lake other than a thousand fish?

7 MR. WALDO: Well, sure. There's
8 microinvertebrae and --

9 CHIEF JUSTICE ROBERTS: Microinvertebrae?

10 MR. WALDO: I mean, all sorts of the things
11 that fish feed on. Plant life and animal life, and all
12 that stuff.

13 JUSTICE SCALIA: Plankton and stuff.

14 MR. WALDO: Yes. Whatever. I'm not an
15 expert on the ecology of this lake, but there is a
16 couple of different kinds of fish and other life that
17 make it possible for those fish to live there, and
18 essentially --

19 JUSTICE BREYER: Is it right --

20 MR. WALDO: -- it would all be destroyed.

21 JUSTICE BREYER: Is it right -- now, I am
22 back on my hobby horse -- but is it right that this
23 slurry is pushing into this lake 50 feet or 75 feet
24 covering the bottom with some stuff? A lot of it's
25 dirt, and some of it's the worst chemical ever, except

1 it's not toxic? Okay. I guess cyanide isn't toxic.

2 But the -- the -- now I just heard that if
3 the EPA doesn't give the permit, but the Corps of
4 Engineers does, the EPA has the power to veto the
5 permit. Is that right?

6 MR. WALDO: EPA can veto for unacceptable
7 adverse consequences. It's not a way to enforce
8 effluent limitations.

9 JUSTICE BREYER: Why not? If they have a
10 veto power --

11 MR. WALDO: Because that's all 404(c) says.

12 JUSTICE BREYER: I know it comes under a
13 different statute, but in any instance where in fact
14 they see that some of their rules that they promulgate
15 are being violated and they think the Corps of Engineers
16 is not paying attention to those rules, they can veto
17 it.

18 MR. WALDO: Well, but then --

19 JUSTICE BREYER: If they don't veto it, then
20 that would be a way of reconciling these two things.

21 MR. WALDO: The -- the position that EPA has
22 taken in this case, unfortunately, is that, if the
23 discharge meets that definition of fill material, no
24 matter how bad the consequences are for water quality,
25 it's fill material, and it's therefore exempt from

1 effluent limitations --

2 JUSTICE BREYER: So couldn't they veto it?

3 MR. WALDO: Only if it was for adverse --
4 well, if they found adverse -- unacceptable adverse
5 consequences --

6 JUSTICE BREYER: And wouldn't an
7 unacceptable adverse consequence be that it puts all
8 this effluent into the water?

9 MR. WALDO: It's a different standard from
10 whether it violates an effluent limitation. That's all
11 I'm saying.

12 And I want to be clear that the effluent in
13 this case, although it doesn't necessarily violate any
14 toxic pollutant effluent, it is toxic. It's toxic with
15 conventional pollutants. It has a pH of 10, which is
16 toxic to aquatic life. It's very high. It's about the
17 pH of ammonia, is what this slurry effluent is that's
18 being discharged in this case. And the --

19 JUSTICE ALITO: Isn't that the pH at the
20 point where it's discharged, and not the general pH in
21 the lake?

22 MR. WALDO: It will dilute in the lake.
23 They are using the lake as their diluting settling pond.
24 That's right. They're using a navigable water body --

25 JUSTICE ALITO: What's the answer to the

1 question, when -- once it's released into the lake,
2 what's the pH of the lake as opposed to the --

3 MR. WALDO: Oh, it will dilute in the lake,
4 so it will revert to normal levels, but --

5 JUSTICE ALITO: Within how long?

6 MR. WALDO: Oh, I mean, that happens, you
7 know, in a -- some sort of a mixing zone just outside
8 the pipe. That happens pretty quickly.

9 Now, for the lake to recover --

10 JUSTICE ALITO: The pH that you just cited
11 was the pH --

12 MR. WALDO: Of the slurry.

13 JUSTICE ALITO: -- just at the point of the
14 discharge?

15 MR. WALDO: Of the slurry. That's right.
16 And -- now I want to talk about this allegation that
17 it's like dumping wet sand in the lake. That's not true
18 at all. They tested the tailings sediment from this
19 discharge with two organisms, and with one of them, it
20 killed 95 percent of the organisms in the test, which is
21 way over the top for EPA's toxicity threshold. In the
22 other organism they had, it -- the organism survived,
23 but their reproduction rate was significantly reduced,
24 also meeting the toxicity test standards that EPA
25 establishes. So this --

1 CHIEF JUSTICE ROBERTS: Just to follow up,
2 that's the same point, though, that Justice Alito made:
3 You're testing that right as it comes out, not as it's
4 diluted in the lake.

5 MR. WALDO: No. No, Your Honor, that's not
6 right. That's what the solids -- that's the affect of
7 the solids, and that's why, as a result of that, they
8 established this rule that --

9 CHIEF JUSTICE ROBERTS: I'm sorry, I didn't
10 understand you. I thought you said that the toxicity in
11 the slurry was tested and killed 99 or whatever percent
12 of these invertebrates.

13 MR. WALDO: They took that slurry, they let
14 the solids settle down in the bottom, and then they
15 tested the solids for what effect it would have on some
16 fresh water organisms, because they were trying to
17 determine whether the lake would be able to recover from
18 depositing all these solids into the lake. And they
19 found that it had a very high toxicity level. And so
20 what they did to try to remedy that was require
21 depositing native vegetation on the top of all of that,
22 after the mine closes. And they are hoping that that
23 will have the effect of letting the lake recover. But
24 EPA concluded that it will take decades, if ever, before
25 the lake can recover from that.

1 So this is not some benign wet-sand kind of
2 discharge. It's a toxic slurry with a high pH level and
3 with effects that are going to last for decades. And if
4 EPA -- if section 404 is interpreted to allow these
5 kinds of discharges to be emitted exempt from effluent
6 limitations, it eviscerates key requirements of the
7 Clean Water Act. EPA is required to regulate sources of
8 this type through effluent limitations. EPA is required
9 to regulate the suspended solids through effluent
10 limitations from industrial sources like this. So --

11 JUSTICE BREYER: If, in fact, you have this
12 mix, and it satisfies -- it goes to an effluent part and
13 a fill part, in your view, what -- if the statute says
14 both agencies regulate, they have to meet both, one or
15 the other? How does it work?

16 MR. WALDO: If there's an effluent
17 limitation, the effluent -- there's a performance
18 standard under section 306. The performance standard
19 must be complied with under section 306(e). And the
20 only way --

21 JUSTICE KENNEDY: You say this is 404; it's
22 not 402 --

23 MR. WALDO: No.

24 JUSTICE KENNEDY: It is 306?

25 MR. WALDO: 404 is not appropriate here

1 because there is an effluent limitation. With fill
2 material --

3 JUSTICE KENNEDY: But it is fill.

4 MR. WALDO: It's fill material, but it's not
5 fill material that is available for a section 404
6 permit. And EPA has always regulated discharges from
7 sources like this, that meet that definition of fill
8 material. EPA has had an effects-based definition of
9 fill material since virtually the beginning of the Clean
10 Water Act.

11 JUSTICE BREYER: So fill material is only
12 that material as to which no effluent standard applies?

13 MR. WALDO: No, it's fill material. In this
14 case, it's fill material, but this fill material is not
15 eligible for a 404 permit.

16 JUSTICE BREYER: 404 material is material
17 such that it is fill material and there is no effluent
18 standard applicable?

19 MR. WALDO: Yes, that's correct. And --

20 JUSTICE ALITO: So, it's 95 percent solid,
21 but there's an effluent limitation, and your position is
22 that there can't be a 404 permit; it has to be a 402
23 permit?

24 MR. WALDO: If it's covered -- if that
25 discharge is covered by an effluent limitation, yes,

1 that's correct. And I want to be clear about this
2 point, that EPA -- well, I guess my time is up.

3 CHIEF JUSTICE ROBERTS: Go ahead. Finish
4 your thought.

5 MR. WALDO: Okay. EPA amended its
6 regulations in 1979 specifically to recognize the fact
7 that some discharges of fill material are not eligible
8 for section 404 permits and require NPDES permits. At
9 that time, the regulations said you don't need an NPDES
10 permit if it's fill material. EPA amended that
11 regulation to say you don't need an NPDES permit if it's
12 fill material and it's subject to section 404 of the
13 Clean Water Act. And the purpose of that --

14 CHIEF JUSTICE ROBERTS: Thank you, Mr.
15 Waldo.

16 MR. WALDO: Thank you.

17 CHIEF JUSTICE ROBERTS: Mr. Olson, you have
18 three minutes remaining.

19 REBUTTAL ARGUMENT OF THEODORE B. OLSON
20 ON BEHALF OF THE PETITIONERS

21 MR. OLSON: What the Respondents would wish
22 to do is to have this Court disagree with the agencies'
23 interpretation of the statutes which they administer,
24 their consistent interpretations of those statutes, and
25 the factual findings that a whole slew of agencies made

1 with respect to the subject matter of these permits.

2 The preamble of the 202 -- the 2002 fill
3 regulations specifically says -- this is 31,135 of
4 Federal Register Volume 67 -- EPA has never sought to
5 regulate fill material under effluent guidelines.
6 Never.

7 There was an agreement, a memorandum of
8 agreement between EPA and the Corps of Engineers in
9 1986. It is cited at the United States Government brief
10 at page 27. The EPA and the Corps agree -- and this is
11 in response to your question, Justice Breyer, and I
12 think something Justice Kennedy said and something
13 Justice Souter said with respect to what if there are
14 two things in the stream going into the water. Fill
15 material remains subject to 404 permitting even if they
16 occur in association with discharges meeting 402
17 criteria. That's the answer to that question. And the
18 -- and the EPA --

19 JUSTICE KENNEDY: But I thought -- I thought
20 your brother would say: But that does not respond to
21 306 effluent.

22 MR. OLSON: 306 provisions in the statute
23 are not made applicable to 404 permitting, and the
24 consistent regulatory history from 1973 -- and it's all
25 set out on page 27, or summarized on page 27 of the

1 government's brief -- are that 301 and 306 are not
2 applicable under the 404 process.

3 And if there was any doubt at all, there is
4 a -- the so-called mine tailings memorandum at pages 141
5 through 145 of the joint appendix in which three top
6 officials of the EPA construe what they call the rules,
7 the regulations, and the statute. This is both
8 agencies. Under the plain regulation language of the
9 rule -- this is page 145a -- under the plain language of
10 the rule and the agency's interpretation of the
11 regulation in its preamble, the mine tailings that are
12 to be placed into an impoundment are covered by 404.
13 And it specifically addresses this --

14 JUSTICE SOUTER: Why does that mean anything
15 more than you've got to get a 404 permit without
16 addressing the question whether you can get a 404 permit
17 if it has, in effect, the -- the -- if it has the
18 effects which are supposed to be regulated by the
19 effluent limitations?

20 MR. OLSON: That precise question,
21 Justice Souter, is addressed on pages 143, 144, and 145
22 of this memorandum from top officials of the EPA,
23 applicable to this particular mine and these particular
24 discharges --

25 JUSTICE SOUTER: Where is -- where is that

1 in the appendix?

2 MR. OLSON: That's on pages 141 through 145a
3 of the joint appendix.

4 JUSTICE STEVENS: But as I read that
5 sentence, Mr. Olson, it says they are subject to both
6 permitting.

7 MR. OLSON: No, it doesn't. It says -- with
8 due respect, Justice Stevens, it says on the bottom of
9 page 144: "As a result, the regulatory regime
10 applicable to the discharges under section 402," and so
11 forth. What -- I think one thing that --

12 JUSTICE STEVENS: You are talking about the
13 last sentence on --

14 MR. OLSON: There is a 402 permit in this
15 case, too there is a 404 permit with respect to material
16 going into the lake and a 402 permit for the material
17 coming out of the lake into the waters of the United
18 States.

19 CHIEF JUSTICE ROBERTS: Thank you, Mr.
20 Olson. The case is submitted.

21 (Whereupon, at 11:06 a.m., the case in the
22 above-entitled matter was submitted.)

23

24

25

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